

Hon. Ronald B. Leighton

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

NEIDINGER, KRISTINE M.,	) NO. C10-5702-RBL
	)
Plaintiff,	) PLAINTIFF'S RESPONSE TO DEFENDANTS'
	) MOTIONS IN LIMINE
v.	)
	) Motion Noted for Consideration:
EARP, ELIZABETH W., et al.,	) September 14, 2012
	)
Defendants.	)
	)

1. MOTION TO EXCLUDE DISCIPLINE RECORDS AND PERSONNEL FILES.

Plaintiff is not planning on seeking to introduce internal affair investigations regarding any named Defendant.

2. MOTION TO PREVENT PLAINTIFF FROM TESTIFYING REGARDING HER INJURIES.

Plaintiff will testify regarding her injuries based upon personal knowledge. Plaintiff is not being proffered as her own expert witness Plaintiff does not have formal medical training. Therefore, Plaintiff will not be testifying as a medical expert with respect to causation.

However, Defendants' motion requests too much. A lay witness may testify "in the form of opinion" if it is "rationally based upon the witness's perception," is "helpful to clearly understanding the witness's testimony or to determining a fact in issue;" and is "not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. In other words, if a



1 witness can describe, for example, the absence of TASER burns, bruises, or other physical  
2 injuries in advance of an incident; the presence of those injuries after the incident; and how the  
3 incident involved the use of a TASER, punches, and other uses of force; that witness may opine  
4 those uses of force caused those injuries.

5 To the extent Defendants are seeking to prevent Ms. Neidinger from providing  
6 legitimate lay witness opinion testimony, their motion should be denied.

7  
8 3. MOTION TO LIMIT TESTIMONY OF ERNEST BURWELL.

9 a. Motion to Limit Mr. Burwell from Using Certain Phrases.

10 Mr. Burwell's anticipated testimony will be limited to that authorized under Fed. R.  
11 Evid. 702 in that it will help the jury "understand the evidence or to determine a fact in issue."  
12 Defendants have provided no reason the specific phrasing of that testimony should be limited in  
13 advance, and therefore Defendants' motion should be denied.

14 b. Motion to Limit Mr. Burwell from Discussing Pierce County Policy.

15 See Response to Motion # 4, *infra*.

16 4. MOTION TO EXCLUDE TESTIMONY REGARDING POLICIES.

17 Although a law enforcement agency's policies and training materials "are not  
18 dispositive, [a finder of fact] may certainly consider [that agency's] own guidelines when  
19 evaluating whether a particular use of force is constitutionally unreasonable." *Drummond v.*  
20 *City of Anaheim*, 343 F.3d 1052, 1059 (2003). "[I]t may be difficult to conclude that the  
21 officers acted reasonably if they performed an action that had been banned by their department  
22 or of whose dangers in these circumstances they had been warned." *Id.* (citing *Gutierrez v. City*  
23 *of San Antonio*, 139 F.3d 441, 449 (5<sup>th</sup> Cir. 1998)); *see also Scott v. Henrich*, 39 F.3d 912, 916  
24 (9<sup>th</sup> Cir. 1994) ("Thus, if a police department limits the use of chokeholds to protect suspects  
25



1 from being fatally injured...such regulations are germane to the reasonableness inquiry in an  
2 excessive force claim.”).

3 Therefore, although Pierce County's policies do not dictate the constitutional constraints  
4 imposed by the Fourth Amendment on Defendants' actions, those policies are relevant to the  
5 reasonableness inquiry, as well as the qualified immunity inquiry. Therefore, Defendants'  
6 motion should be denied.

7 5. MOTION TO PROHIBIT TESTIMONY REGARDING INSURANCE OR  
8 INDEMNIFICATION.

9 Plaintiff is not planning on seeking to introduce evidence Defendants were or were not  
10 insured against liability.  
11

12  
13 DATED this 10<sup>th</sup> day of September, 2012.

14  
15 /s/ Christopher Taylor  
16 Christopher Taylor  
17 Attorney for Plaintiff  
Washington State Bar Association # 38413  
email: [taylor@ftlawps.com](mailto:taylor@ftlawps.com)

18 CERTIFICATE OF SERVICE

19 I certify that on September 10, 2012, I electronically filed the foregoing PLAINTIFF'S  
20 RESPONSE TO DEFENDANTS' MOTIONS IN LIMINE, with attachments, with the Clerk of  
21 the Court using the CM/ECF system which will send notification of such filing to the  
22 following:

- 23 • Michelle Luna-Green, Attorney for Defendants: [mluna@co.pierce.wa.us](mailto:mluna@co.pierce.wa.us)  
24

25 /s/ Christopher Taylor  
26 Christopher Taylor